Brief in Support of Petition for Writ of Certiorari

I. THE METHOD COMPLAINED OF, THAT IS THE ADVERTISING OF THE FINANCE PLAN, IS NOT A METHOD OF COMPETITION IN INTERSTATE COMMERCE.

Section 5 of the Federal Trade Commission Act, as in effect during the period when the acts complained of took place, provides as follows:

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition **in commerce,** and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect * * *."

By definition in the act, of course, the words "in commerce" mean as applicable to this case, "interstate commerce".

(a) The *plan* of financing described above is not, and could not be, the subject of complaint by the Commission. It is the method of *advertising* that is complained of. **The plan itself and the advertisement thereof relate solely to the financing of retail sales by automobile dealers in *intrastate* commerce.** No claim is made by the Commission that the plan, or the advertising thereof, has anything to do with the financing of sales made by Ford Motor Company in interstate commerce.

The Supreme Court in *Federal Trade Commission v. Bunte Bros. Inc.*, 61 Sup. Ct. Rep. 580 (decided

February 17th, 1941) decided that "an unfair method of competition" where employed wholly in *intrastate* commerce was beyond the jurisdiction of the Federal Trade Commission to regulate, regardless of the extent to which it *affected* competition in interstate commerce. The court points out the distinction between such a statute as we are concerned with here, where the methods used must be *in* interstate commerce, and such statutes as the National Labor Relations Act, which may permit regulation of local activities if they *affect* interstate commerce.

It may be urged in answer to the foregoing that in the *Bunte case* the manufacturer itself only shipped *intra-state* and that in such cases as *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, 54 Sup. Ct. 423, where the manufacturer shipped interstate, the Commission was given jurisdiction; and that the present case is distinguishable from the *Bunte case* on the ground that Ford Motor Company is engaged in competition in interstate commerce as against other manufacturers that ship interstate to their own dealers. The answer to this, however, is that in such cases as the *Keppel case* the unfair method of competition (consisting of the shipment of so-called "break and take" packages) was actually used *in* the interstate transaction or shipment. In our case the alleged unfair method of competition, namely the advertising, does not enter into the interstate transaction, that is the shipment of cars by Ford to the dealers, at all.

The financing, and the advertising thereof, relates *solely to intrastate sales* by dealers who have taken title to the automobiles, and in respect to sales

which take place after the interstate commerce in the cars has wholly and definitely terminated. **It is obvious from the decision in the *Bunte case* supra that if a Ford dealer, thus selling intrastate, made a false representation to a prospective purchaser of a car, the Federal Trade Commission would have no jurisdiction to enter any cease and desist order against him. The use by Ford Motor Company itself of an *alleged* unfair method in promotion of such *intrastate* sale could not convert that which would be essentially a method of competition in *intrastate* commerce into a method of competition in *interstate* commerce; and this is true notwithstanding that that practice might have some *effect* upon the competition in interstate commerce existing between Ford Motor Company and other manufacturers of automobiles. In other words, it might then *affect interstate commerce* but it would not be a method of competition *in interstate commerce*. This, to our mind, is the rationale of the *Bunte case*.**

The opinion of the Circuit Court of Appeals clearly shows that that court thought it sufficient if the methods complained of *affected* interstate commerce. It states that petitioner urged "that the method of petitioner does not affect competition in interstate commerce". This is not a correct statement of the question as presented in the court below. Petitioner's brief there stated the proposition as follows: "The methods complained of are not methods of competition in interstate commerce". The opinion below says:

> "All of those things which stimulate or decrease the flow of commerce, although not directly in its stream, are essential adjuncts thereto, and the Congress has power to confer on the Federal Trade Commission their regulation".

And, again, it states:

> "The sale on credit of petitioner's cars by its local dealers, when separately considered, may be intrastate in character but when the activities of petitioner's local agencies are weighed in the light of their relationship to the petitioner, and its financing sales of cars, it is at once apparent that there is such a close and substantial relationship to interstate commerce that the control of such activities is appropriate to its protection."

We respectfully submit that this is wholly beside the point. As the Supreme Court said in the *Bunte case, supra*:

> "This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce', requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."

Here, it is not even shown that the method complained of *directly* affects interstate commerce in any way, and there would therefore be no jurisdiction even under acts of Congress permitting regulations of local activities affecting interstate commerce:

Anderson v. United States, 171 U. S. 604, 615, 19 Sup. Ct. 50 (at page 54);

Schecter Poultry Corporation v. United States, 295 U. S. 495, 55 Sup. Ct. 837.

However, even if it did affect such interstate commerce *directly*, it is clear from the foregoing that the Federal Trade Commission has no jurisdiction, because the method complained of is not *in* interstate commerce.

(b) There is no showing in the record that the method complained of has any injurious tendency to affect the business of Ford Motor Company's competitors. There is no evidence that any automobile manufacturer or any finance company felt it necessary to adopt any particular form of *advertising* in order to meet competition either of Ford Motor Company or any other company which had adopted this plan. *It is clear that it was not the method of advertising that affected any competitor, but that it was the plan itself.* The rates offered by the new plan were lower than those offered by any other plan then in existence and other companies were obliged to adopt the plan for that reason and on account of other meritorious elements of the plan itself. The testimony is uniform in this respect. We submit that for this reason it is not shown that the alleged method affected competition in such a manner as to give the Federal Trade Commission any jurisdiction within the rule laid down in *Federal Trade Commission v. Raladam Company*,* 283 U. S. 643, 51 Sup. Ct. 587 (1931).

*On March 21, 1938, a year and four months after the complaint in this case was filed, the Federal Trade Commission Act was amended (52 Stat. 111, Chap. 49) to include a prohibition against "unfair or deceptive practices in commerce" in addition to the former prohibition against "any unfair method of competition". This amendment cannot affect the rights of petitioner, for it affirmatively appears that no advertising of the character referred to has been used by petitioner since some months prior to the filing of the complaint, and in any event the present complaint was brought under the act prior to the amendment referred to.

II. THE METHODS COMPLAINED OF ARE NOT UNFAIR.

The advertising used by petitioner was literally true. Furthermore, the public was either given the exact working of the plan in the advertisements or was invited to consult dealers respecting the operation of same. The calculation was simple. The testimony of the witnesses produced by the Commission demonstrates that such witnesses had no difficulty in making the calculations involved, and thoroughly understood the difference between the operation of this plan and the charging of 6% simple annual interest upon declining balances. There was nothing secret or concealed about the operation of this financing plan. It did not involve any constituent of the goods sold, for the character of which the purchaser must rely upon statements made by the seller. The amount charged for financing and the exact character thereof was open and clear to anyone entering into a transaction involving this plan. The testimony of Commission's witnesses clearly demonstrates this if it needs any demonstration.

The fallacy of the Commission is in assuming that a percentage figure can refer only to simple interest upon declining balances. No reference was made to "interest" in the advertising. Even if the word "interest" had been used, the same would have been entirely consistent with ordinary practice as demonstrated by this record. Federal Housing Administration and the Federal Electric Home and Farm Authority, both organized pursuant to authority of Congress, in connection with financing of certain of their public activities use plans identical in principle with that used by petitioner, and actually advertise the financing charge as "interest". Small loan departments of banks do the same thing. It is ordinary

practice. The undisputed testimony in the record, by Commission's own witnesses, fully demonstrates this.

The record also fully demonstrates, out of the mouths of Commission's own witnesses, that no purchaser was actually deceived in any way, or even relied upon any of the company's advertisements of the 6% plan in purchasing an automobile. Only three of the Commission's witnesses bought any automobile on any deferred payment plan during the period during which the 6% plan was being advertised. The advertising of the plan had nothing to do with the purchase by any of the three.

Counsel for the Commission insisted upon attempting to elicit from each of these witnesses for the Commission, in spite of their lack of interest in or reliance upon the plan, his or her casual impression as to what the phrase "6%", lifted bodily out of the advertisement, would mean to such witness. The result was substantially an evenly divided expression of opinion as between those who thought that it might refer to simple interest upon declining balances and those who supposed it to mean exactly what the plan in fact called for. This is far, however, from indicating that any of the witnesses was deceived. It was merely asking a witness to speculate in advance as to whether the percentage symbol referred to simple interest on declining balances or to a financing charge of 6% of the original balance.

Every witness who was asked stated that if he were interested in buying a car on time payments he would have inquired of the dealer for details pertaining to same, and the only witness who did inquire received a full explanation and thoroughly understood the plan before he purchased.

III. THE FORM OF THE ORDER IS INDEFENSIBLE.

This question really involves more than the mere form of the order. The fact is that the order directs petitioner to cease and desist from doing things that are not only obviously perfectly legitimate but the doing of which is not complained of in the complaint filed by the Commission. This complaint relates solely to the method of *advertising*. The order of the Commission (affirmed in toto by the Circuit Court of Appeals) says nothing about advertising but orders that Ford Motor Company

> "in connection with the offering for sale, sale and distribution of motor vehicles in interstate commerce or in the District of Columbia, do forthwith cease and desist from:
>
> Using the word 'six per cent' or the figure and symbol '6%', or any other words, figures or symbols indicating percentage, in connection with the cost of, or the additional charge for, the use of a deferred or installment payment plan of purchasing motor vehicles, when the amount of such cost or charge collected from, or to be paid by, the purchaser of a motor vehicle under such plan is in excess of simple interest at the rate of 6% per annum, or at the rate indicated by such words, figures or symbols, calculated on the basis of the unpaid balance due as diminished after crediting installments as paid;
>
> Acting concertedly or in cooperation with any company, firm or individual, or with any of its agents or dealers, in a way calculated to further the sale of motor vehicles through use of the methods referred to in paragraph (1) of this order."

As this order now stands it practically amounts to a prohibition of the *use of the plan itself*, a matter which

has never been complained of by the Commission. The record shows (R. 55-56) that other companies that entered into stipulations in regard to the advertising complained of were permitted to advertise the plan under the expression "6%" provided they used explanatory language. In the present order not only does the Commission refuse to permit Ford Motor to use the expression at all in advertising the plan, but it prohibits it from any use whatsoever, without limiting its denial thereof to use by petitioner in *advertising,* which was the matter complained of.

As the order to cease and desist is not limited to the matter charged in the complaint it is improvident and should be annulled:

> *Federal Trade Commission v. Gratz,* 253 U. S. 421, 40 Sup. Ct. 572;
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> *Wrisley Company v. Federal Trade Commission,* 113 Fed. 2d 437, at 442.

THE GENERAL MOTORS CASE.

Under date of August 12th, 1940, the Circuit Court of Appeals for the Second Circuit in the case of *General Motors Corporation et al. v. Federal Trade Commission* (114 Fed. 2d 33) sustained the entry by the Commission of a cease and desist order against General Motors Corporation and certain subsidiaries substantially identical with the cease and desist order of which petitioner is here complaining. The application of General Motors for a writ of certiorari in that case was denied by the Supreme Court on the 20th day of January, 1941 (61 Sup. Ct. 550).

"The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times":

United States v. Comer, 260 U. S. 482, 43 Sup. Ct. 181;

Atlantic Coast Line R. Company v. Powe, 283 U. S. 401, 51 Sup. Ct. 498.

As petitioner pointed out in its reply brief in the Circuit Court of Appeals, the presentation of the *General Motors case* in the Circuit Court of Appeals for the Second Circuit differed substantially from the presentation of petitioner's case in the Sixth Circuit Court of Appeals. The same is true with respect to its application for writ of certiorari to the Supreme Court. This can be made clear by a reference to the briefs and records in the *General Motors case* and is also demonstrated by the fact that in the petition of General Motors Corporation et al. to the Supreme Court for a writ of certiorari (see page 2 of said petition) the only questions presented were the following:

> "Does the power of the Federal Trade Commission to regulate unfair methods of competition in commerce extend to advertising of a corporation not engaged in commerce, by reason of the fact that its capital stock is owned by another corporation engaged in commerce in a different activity?
>
> "Does the Federal Trade Commission's power of regulation for the protection of the unwary, trusting or ignorant against statements which are false extend to statements which are true as well as reasonably informative?"

In other words, on the matter of jurisdiction the G. M. confines itself to the question of its responsibility for

the acts of G.M.A.C. That this was treated as the only question raised in the matter of jurisdiction in respect to interstate commerce is also shown in the opinion of the Circuit Court of Appeals, which devotes only one paragraph, the final paragraph of its opinion, to this phase of the case and dismisses the contention made by G. M. upon the basis of *Federal Trade Commission v. Educational Society*, 302 U. S. 112, and *National Harness Manufacturers Association v. Federal Trade Commission*, 268 Fed. 705. The *Educational Society case* involved an attempt by one corporation to evade a cease and desist order by organizing another. A reading of the opinion in that case will show that the sales were clearly in interstate commerce and involved representations or unfair practices in that commerce. The decision has nothing to do with the issue raised by us in the instant case. A similar question was involved in the National Harness Manufacturers Association, that is as to whether a corporation could escape restraint by employing a medium in the form of an unincorporated voluntary association. The question we are concerned with does not appear to have been involved.

G. M.'s contention that no unfair method was involved appears from its brief in the Second Circuit (Page 27 et seq. thereof) to have been based almost solely upon showing that in its initial advertisement of the plan and some subsequent advertisements it explained the plan in detail and that the testimony shows this was understood by the members of the public. The argument almost wholly ignores the other advertisements referring in brief phrase to the "6% Plan". As we think we have shown in our brief, the use of this title is in no way misleading, but the brief in the *G. M. case* fails to develop this argument and relies, as stated above, largely upon the explanation in certain of the advertisements. That this is

a fair inference as to the restricted character of G. M.'s argument is indicated in the opinion of the Circuit Court of Appeals of the Second Circuit, wherein the court takes care to point out that there was a body of advertising matter on billboards and window posters not containing the explanation in some of the other advertisements and so much relied upon by G. M. in its argument. A similar deficiency of argument is indicated in the petition for writ of certiorari and was promptly seized upon in the brief filed for the Federal Trade Commission in opposition to this writ, where it was pointed out by the Commission that much of the advertising was without any explanatory statement. It is difficult of course to see why the Second Circuit Court of Appeals in any event would find the explanatory advertisements deceptive or unfair, and we believe such finding is demonstrably an error on the part of that court. The situation may be summarized we think by stating that so much emphasis was placed by G. M. on the explanatory advertisements that the court assumed in the absence of illuminating argument that reference to a 6% plan as a title merely, was in some manner deceptive, and that as the bulk of the advertising was of this character it did not take the pains to distinguish between the two in affirming the order of the Commission in its totality.

No exhibits were introduced in the *G. M. case* such as respondent's Exhibits 7, 8 and 9 in the instant case, showing that Governmental instrumentalities such as Federal Housing Administration and Electric Home and Farm Authority engage in practices identical with those complained of by the Commission here, and even in their presentation of same to the public designate the financing charge as "interest", which petitioner has not done. Nor have we been able to find in the *G. M. case* evidence similar to that in the instant case relative to similar

practices on the part of banks in various localities. The argument presented by us in this case (and supported by the exhibits relating to F. H. A. and others and by testimony relative to practice of banks, and also supported by a number of Commission's own witnesses), that even if the percentage be regarded as referring to interest, the latter is a generic term and does not necessarily have the restricted meaning attributed to it by the Commission, was not advanced in the *G. M. case.*

CONCLUSION.

Each of the foregoing propositions was presented to the Sixth Circuit Court of Appeals. It, however, followed the decision of the Second Circuit Court of Appeals in the *General Motors case* referred to above, and affirmed the order of the Commission in full. We submit that the questions involved are substantial and that the foregoing petition for a writ of certiorari should be granted.

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